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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 232

W. BROWN MORTON,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent,

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, W. Brown Morton, prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit to review the judgment of that Court in this cause filed April 22, 1949 (R. 29). A petition for rehearing (R. 31) was denied on May 9, 1949 (R. 34).

A certified transcript of the record in this case, including the proceedings in the Circuit Court of Appeals, is furnished herewith in compliance with Rule 38 of the Rules of this Court.

Summary Statement of the Matter Involved

This action arose as an action by petitioner in the Tax Court of the United States to set aside a deficiency determination in the amount of $4249.98 with respect to petitioner's income tax for the years 1942 and 1943. Certain items making up the deficiency were adjusted between the parties, leaving for determination by the Court a single question, namely, whether or not petitioner was entitled to deduct losses in computing his net income for the years 1942 and 1943 of $2879.24 and $2914.33, respectively, sustained in operating a farm.

The facts are not in dispute. The property consisted of two separate tracts each of approximately 150 acres each having its own dwelling and appropriate farm buildings. The property was purchased in 1929 with the expectation that petitioner would shortly retire from the active practice of his profession and devote his time to farming as a business. Because of the depression of 1929 it was necessary for petitioner to continue his professional activity and no attempt was made to farm as a business until 1942, the first year for which losses were claimed.

From 1929 on to the present time petitioner has maintained a summer residence on one tract and for approximately ten years preceding 1942 allowed an impecunious friend to live, rent free, on the other tract and farm it for his own benefit. Beginning with the year 1942 the party occupying the separate tract of 150 acres moved away. Petitioner then engaged a tenant farmer on shares to occupy the premises and farm the arable land of both tracts. Under the share-cropping contract "petitioner furnished all seed, equipment and working stock and the tenant furnished the labor" (Tax Court's Findings, R. 6). Due, however, to the wartime labor shortage, which was particularly acute because of the proximity of the farm to the Naval Proving Ground at Dahlgren, Virginia, and

the Marine Base at Quantico, Virginia, the tenant was unable to carry out the farming operations on the expected scale, but did continue to live on the place and did succeed, with a small amount of labor, in raising enough produce to feed the stock and to generally keep the place in condition for more extensive farming operations to be conducted if and when the labor shortage permitted. The separate tract of 150 acres was, however, sold by petitioner in 1944, thereby terminating the operations begun in 1942 and in connection with which the deduction for losses sustained is claimed.

The Tax Court held that the petitioner was not engaged in the business of farming during the years 1942 and 1943 and that the deductions for losses should not therefore be allowed as expenses incurred in carrying on a business. The Tax Court also held that the property was not held for the production of income, and that the expenses were not, therefore, allowable as deductions under Section 23(a)(2) of the Internal Revenue Code as expenses for the conservation and maintenance of property held for the production of income.

In the opinion accompanying its findings, the Tax Court took the position that the expressed intention of petitioner to farm the property in 1942, accompanied by the employment of a farmer on shares, and the purchase of farming equipment for his use was offset by the inference to be drawn from the fact that no profit had been realized by petitioner since his purchase of the farm in 1929. In making this inference the Tax Court apparently ignored the fact that the business in which the loss occurred, namely, the share-farming arrangement with the tenant, was not begun, until the tenant was employed in 1942. An appeal was taken from the ruling of the Tax Court to the Court of Appeals of the Second Circuit, alleging as error the conclusion of the Tax Court that the enterprise initiated in 1942 was not a business within the mean-

ing of Section 23(a)(1)(A), and also that there was error in the conclusion that the property was not held for the production of income.

Before the Court of Appeals of the Second Circuit it was urged that the fact that no profit was realized by petitioner from the farm for the years preceding 1942 was irrelevant to any issue presented because of the undisputed fact that prior to that time no attempt was made by petitioner to operate the farm as a business. The Court of Appeals, however, affirmed the ruling of the Tax Court, holding that it could not be set aside because it could not be said that its findings "were clearly erroneous," thereby applying the provisions of Rule 52 of the Rules of Civil Procedure applicably only to the questions of fact to an erroneous *legal* conclusion of the Tax Court, viz., that the lack of profits during the years the farm was *not* operated as a business was relevant and material to the intent of petitioner in the operations of the farm for the years beginning 1942 when the business arrangement in which the losses occurred was begun.

The fact is not in dispute that during the years prior to 1942 no attempt was made to operate the farm as a business and that the expenditures made during those years were those incidental to the use of the place as a country residence and certain experimental activities prior to 1932 looking toward possible future farming operations (R. 15).

The error of the Tax Court in considering the fact that no profits were made during these years as relevant to the question of the nature of the operations begun in 1942 is an error of law and not one of fact and is not subject to the restrictive provisions of Rule 52 of the Federal Rules of Civil Procedure.

The refusal of the Court of Appeals for the Second Circuit to set aside the ruling of the Tax Court on the

ground that the finding was not "clearly erroneous" is directly contrary to the established rule of the Courts of other Circuits that the review of the rulings of Trial Courts on questions of law and "inferences and conclusions drawn by the Trial Court from its fact findings" is not restricted by the provisions of Rule 52 of the Federal Rules of Civil Procedure.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229 (28 U. S. Code, Sec. 347) and also under 26 U. S. Code, Section 1141(a) as amended January 25, 1948, c. 646, Sec. 36, 62 Stats. 991.

The judgment of the U. S. Court of Appeals for the Second Circuit which petitioner seeks to have reviewed was entered on April 22, 1949 (R. 29) and petition for rehearing was denied on May 9, 1949 (R. 34).

Questions Presented

1. Do the inferences and conclusions drawn by the Tax Court from its fact findings present questions with respect to which a review by the Appellate Court is limited or foreclosed by the provisions of rule 52 of the Rules of Civil Procedure?

2. Is the fact that no profits were realized from farm property for a number of years when it was not operated as a business but used solely as a country residence, relevant to the question of the allowability of deductions for losses which occurred during subsequent years when the farming operations were placed in the hands of a tenant on shares engaged for that purpose?

Reasons for Granting the Writ

1. The opinion of the Circuit Court of Appeals expressed in this case that the scope of their review was limited by the provisions of Rule 52 of the Federal Rules of Civil Procedure is in conflict with the practice of other Courts of Appeal and of the other Circuit Courts, particularly the Seventh Circuit and the Third Circuit.

> *Murray* v. *Nobelsville Milling Co.*, 131 F. 2d 470, 474 (C. C. A. 7).
>
> "To be sure, where the finding of fact is supported by evidence and is not clearly erroneous, it must be accepted by us, but the rule does not operate to entrench with like finality the inferences or conclusions drawn by the trial court from its fact findings • • •."
>
> *Ball* v. *Paramount Pictures*, 169 F. 2d 317 (C. C. A. 3).
>
> The rule that fact finding supported by evidence and not clearly erroneous must be accepted on appeal does not entrench with like finality the inferences or conclusions drawn by the trial court from its fact findings."

The questions presented here have not been passed on by this Court.

2. The questions presented here are of particular importance at this time because of the recent amendment (Act of June 25, 1948) to the Internal Revenue Act (Title 26, Sec. 1141) which provides that the scope of the review of Tax Court decisions by the Courts of Appeal shall be controlled by the provisions of Rule 52 of the Federal Rules of Civil Procedure. The amendment was passed to enlarge the scope of the review of Tax Court cases.

Prior to the Act of June 25, 1948, the scope of the review accorded the decisions of the Tax Court was governed by the rule laid down in the *"Dobson Case"* (*Dobson* v. *C. I. R.*, 1943, 239 U. S. 489), viz.:

> "Decisions of the Tax Court must have warrant in the record and a reasonable basis in the law, but the judicial function is exhausted when there is found to be a rational basis for the conclusions reached by the administrative body."

Under the *"Dobson Case"* ruling:

> "Findings of fact, inferences to be drawn therefrom and their application to rules of law are functions for Tax Court and are subject to only limited review on question of substantial evidence." *Lewis* v. *C. I. R.*, C. C. A. 1, 1947, 160 F. (2d) 839.

Under the provisions of Rule 52 of the Federal Rules of Civil Procedure it is only the findings of fact themselves which must be "clearly erroneous" to be reversed. The "inferences to be drawn therefrom and their application to rules of law" are no longer "subject to only limited review". The Court of Appeals of the Second Circuit, in applying Rule 52 of the Federal Rules of Civil Procedure, have erroneously considered the inferences to be drawn from the facts and their application to rules of law as still subject to only "limited review".

The passage of the Act of June 25, 1948 gives rise again to the situation vividly described in the excerpt from Magill, The Impact of Federal Taxes (1943), quoted on page 500, 320 U. S. in the opinion of the Court in the *Dobson* case:

> "Magill, The Impact of Federal Taxes (1943) 209, says: 'At the present time, it is impossible to obtain a really authoritative decision of general application upon important questions of law for many years after

> the close of any taxable year. The average period between the taxable year in dispute and a Supreme Court decision relating thereto is nine years. Meanwhile confusion reigns in the day-by-day settlement of the more debatable questions of the tax law. One circuit court holds that a certain situation gives rise to tax liability; another circuit holds the contrary. The Commissioner and the lower federal courts are both confronted with the problem of reconciling the irreconcilable."

Although the case at bar relates to a 1942 return, the question presented here is based on the amendment to the Revenue Act of June 25, 1948, and this Court may by granting this petition hand down "an authoritative decision" on the important question of whether the limited review defined in Rule 52 of the Federal Rules of Civil Procedure applies only to findings of fact or to "inferences to be drawn therefrom and their application to rules of law".

WHEREFORE, YOUR PETITIONER respectfully prays that a writ of certiorari be issued to the United States Circuit Court of Appeals for the Second Circuit to the end that this cause may be reviewed and determined by this Court; that the judgment of the Court of Appeals for the Second Circuit be reversed: and that petitioner be granted such other and further relief as may be proper.

CLARENCE M. FISHER
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Attorneys for the Petitioner

New York 17, N. Y.,
July 28, 1949.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions of Courts Below

The opinion of the Tax Court appears at page 5 of the record and is not reported. The opinion of the Circuit Court of Appeals for the Second Circuit (Circuit Judges L. Hand, Swann and Frank; opinion by Judge Swann) appears at page 25 of the record and is reported in 174 F. 2d 302.

Jurisdiction

The jurisdictional statement appears in the accompanying petition.

Statement of the Case

The essential facts of the case are stated in the accompanying petition and need not be repeated here.

Specification of Errors

The Circuit Court of Appeals for the Second Circuit erred:

1. In not holding that the fact that the petitioner derived no profit from the property during the years preceding 1942 when the premises were used solely as a country home and no farming business was conducted, was irrelevant to any issue presented by the case and that the inferences based thereon by the Tax Court were erroneous.

2. In holding that the inferences and conclusions drawn by the Trial Court must be accepted unless "clearly erroneous".

3. In not reversing the decision of the Tax Court on the ground that there was no evidence to support it.

ARGUMENT

Foreword

The amount involved in this case is insignificant, but the facts presented are typical of thousands of cases where the allowance or disallowance of deductions claimed by taxpayers are necessarily decided by the examiners of the Bureau of Internal Revenue without the benefit of trial procedure wherein competent legal evidence may be produced. When an adverse finding of this nature is contested by action in the Tax Court it should have no presumption of validity whatsoever but the question should be considered *de novo* on the basis of competent evidence submitted in that proceeding. Yet the Tax Court in the case at bar, which is typical of numerous other cases, states in affirming the Commissioner's finding:

> "In the record in this case we do not find sufficient evidence to overcome the presumption of correctness of the Commissioner's finding" (R. 12).

The Court of Appeals in turn refuses to set aside the Tax Court ruling unless "clearly erroneous". The taxpayer is therefore in effect denied a review of his claim in accordance with the established rules and principles governing judicial determinations.

The purpose of the amendment (Act of June 25, 1948) to Sec. 1141 of the Internal Revenue Act as appears from the legislative proceedings in connection with the passage of that amendment, was to insure a review by the Courts of Appeal of the findings of the Tax Court to the fullest extent permissible according to the established rules of legal procedure.

1. The taxpayer's use of the property prior to the year 1942 is irrelevant to the issues presented here.

The Court of Appeals states its reasons for affirming the Tax Court in a single paragraph (R. 29):

"The taxpayer complains that the finding that he was not engaged in the business of farming disregards the evidence that in 1942 and 1943 he operated the farm through his profit-sharing tenant with the intention and expectation of making a profit. It is true that a record of continual losses over a series of years does not in itself preclude the allowance of such losses as a business expense. The intent of the taxpayer in making his expenditures is what counts; but the continuing lack of profits is an important factor bearing on the taxpayer's true intention. The Tax Court gave consideration to the evidence of intention but was convinced that he was not engaged in farming for profit. We cannot hold that finding to be clearly erroneous."

The Court of Appeals summarized the operations prior to 1942 in the following sentence (R. 28):

"From 1932 through 1941 the tenant's house was occupied by a friend of the taxpayer and no farming operations occurred in which the taxpayer had any financial interest."

The direct evidence of petitioner in his testimony and the relevant circumstantial evidence, namely, the arrangement with the tenant to farm the entire property on shares, and the purchase of the required farm equipment, support petitioner's contention that a business within the meaning of the statutes, wherein the petitioner was a partner, was commenced in 1942 for the purpose of deriving income from the land.

It seems self-evident that what transpired prior to the year 1942 when there were no farming operations carried on in which the tax payer had a financial interest has no bearing whatsoever on operations subsequent to that date, pursuant to the contract with the tenant farmer, whereby the taxpayer supplied "all seed, equipment and

working stock". It would hardly be expected that property used solely as a country residence would yield a profit, and the fact that it did not has no bearing on "the taxpayer's true intention" in 1942 when he entered into the new contract with the tenant farmer. In reviewing the action of the Tax Court the Court of Appeals should have disregarded the inferences as irrelevant to the issue.

2. Rule 52 of the Federal Rules of Civil Procedure does not limit the review of the Appellate tribunal with respect to the inferences and conclusions drawn by the trial court.

The Court of Appeals for the Third Circuit and the Seventh Circuit in the cases cited on page 6 of this petition held that the rule that fact findings must be accepted unless "clearly erroneous" does not "entrench with like finality the inferences or conclusions drawn by the trial court from its fact findings."

We know of no ruling by this Court or the Court of Appeals of any other Circuit to the contrary. It is apparent from the matter quoted above (p. 11) from the opinion of the Court of Appeals, that the finding of the Tax Court that the taxpayer did not operate the farm through the profit-sharing tenant with the intention and expectation of making a profit is based on its inferences and conclusions from the alleged "record of continual losses over a series of years". The Court of Appeals in holding that "We cannot hold that finding to be clearly erroneous" considered the inferences and conclusions of the Tax Court as entrenched with the same finality as a finding of fact.

3. There is no evidence to support the findings of the Tax Court.

When possession of the separate tract of 150 acres reverted to the taxpayer upon being vacated by the party

who had occupied the property for the preceding nine years, the taxpayer had the option of trying to sell the property or utilizing it for the production of income. He manifestly had no other use for it. He decided on the second mentioned course, entering into a contract with a tenant farmer to farm the land, including the arable land of the other tract, on shares, the taxpayer to provide the land, the necessary equipment, seed, fertilizer, etc. (R. 6). This was a business arrangement having as its sole purpose the production of income.

The test is one of intention—not an actual profit experience. In *Thacher* v. *Lowe* (288 Fed. 994, D. C. S. D. N. Y. 1922), Judge Hand said in part:

> "The question in this case is a narrow one, and is merely whether the farm which Mr. Davies operated during his lifetime at his residence on Long Island was a 'lawful business carried on for gain or profit'. I have no doubt that a lawyer can operate a farm for profit. However unlikely it may be that he will succeed in the enterprise, the enterprise may in fact be intended as a business. But it is equally clear that a lawyer may run a farm merely as an adjunct to his country place, and between the two *the test appears to me to be only of his actual intention.*" (Italics supplied.)

That the intention rather than the experience is still controlling is clearly indicated in a recent decision of the Tax Court, *Norton L. Smith* v. *Comm'r* (9 T. C. 1150, December 1947), wherein the Court states:

> "It is true that the petitioner has experienced continuous annual losses from the operation of his farm since its acquisition in 1933 and through the taxable years in question. Moreover, the record discloses that after the taxable years involved here there were further

> losses in 1944, 1945 and 1946. *The fact that the operation of the farm has resulted in a series of losses, however, is not controlling if the other evidence shows there is a true intention of eventually making a profit.*" (Italics supplied.)

The assumption of the Tax Court that the separate tract was operated as an adjunct to the country place is manifestly unsound. The country home was complete without the separate tract and had been so for the preceding 9 or 10 years. When the arrangement to farm the separate tract was made the arable land on the home tract was included as part of the business venture. No other conclusion is possible from the evidence.

A somewhat similar situation existed in *Tatt* v. *Comm'r* (166 F. 2d 697, C. C. A. 5, 1948), and the Court stated (p. 698):

> "From the very beginning [1932], petitioner's farm operations resulted in loss; but trying in succession one thing after another, raising truck, raising citrus fruit, raising milch cows, he persisted in his attempts successfully to farm the land. During the tax years in question, years in which the United States was engaged in war, farm labor was difficult to hire, and petitioner was forced to operate his farm with the help of one man. Operations were naturally, therefore, conducted on a small scale, and for each of those years 1941, 1942, and 1943, petitioner's records show losses respectively of $1,369.10, $3,566.72, and $3,766.65."

The Fifth Circuit reversed the Tax Court and allowed the deductions.

Conclusion

WHEREFORE, the petitioner earnestly prays that the petition for writ of certiorari be granted, the cause reviewed, and the decree of the Circuit Court of Appeals for the Second Circuit reversed.

Respectfully submitted,

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New York, N. Y.,
July 28, 1949.

Appendix

Title 26, U. S. Code, Sec. 1141 (a):

"JURISDICTION. The circuit courts of appeal and the United States Court of Appeals for the District of Columbia shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of title 28 of the United States Code."

Rule 52 (a), Federal Rules of Civil Procedure:

"EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *"